

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
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Notice of Inquiry into the need for an	:	
expedited hearings process for	:	04-NOI-01
complaints against an alternative gas	:	
supplier where the complainant seeks	:	
a cease and desist order under	:	
Section 19-120 of the Public Utilities	:	
Act	:	

NOTICE OF INQUIRY  
MANAGER'S REPORT

**I. Introduction**

On August 4, 2004, the Illinois Commerce Commission ("Commission") initiated a Notice of Inquiry ("NOI") into the need for an expedited hearings process for complaints against an alternative gas supplier where the complainant seeks a cease and desist order under Section 19-120 of the Public Utilities Act ("Act") [220 ILCS 5/19-120]. The NOI posed a series of questions and issues in the Appendix to the initiating document and requested that comments address each question and issue individually. Notice of the NOI was sent to the public utilities providing natural gas service, alternative gas suppliers, the Attorney General of the State of Illinois, the Citizens Utility Board, and the City of Chicago. Notice was also published in the official State newspaper.

**II. Commenters**

Pursuant to the NOI instructions, the following entities provided comments to the Commission: the Citizens Utility Board ("CUB"), Northern Illinois Gas Company d/b/a Nicor Gas Company ("Nicor"), Peoples Energy Services Corporation ("Peoples

Energy"), and U.S. Energy Savings Corporation and Interstate Gas Supply of Illinois, Inc. (collectively the "Retail Suppliers"). Nicor, CUB, and the Retail Suppliers provided reply comments. In their initial comments, the Retail Suppliers provided general comments and did not respond to each question posed in the NOI. The complete set of comments can be found on the Commission's internet site at:

<http://www.icc.state.il.us/ng/NOI.aspx>

### **III. Review of Comments on Specific Issues**

The questions that the Commission posed in the initiating document for the NOI covered a number of issues and were designed to explore the perceived need for, the implementation of, and the authority for an expedited proceeding under Section 19-120 of the Act. The relevant portion of Section 19-120 reads:

- (c) The Commission shall have authority after notice and hearing held on complaint or on the Commission's own motion to:
  - (1) order an alternative gas supplier to cease and desist, or correct, any violation of or nonconformance with the provisions of Section 19-110 or 19-115;

Following are the questions and brief summaries of each response.

**Question 1(a): Is there a need for the Commission to implement an expedited process for complaints filed under Section 19-120 of the Public Utilities Act [220 ILCS 5/19-120] in which the complainant seeks a cease and desist order? Please provide specific examples of Section 19-120 docketed proceedings before the Commission in which the lack of an expedited process resulted in denial of the relief sought by the complainant.**

**CUB Initial Comments:** There is a need for an expedited process. To give the "cease and desist" language of the statute real effect, the Commission must act quickly. CUB has been involved in two cases in which it claims that the length of time between

the filing of the initiating complaint and a Commission order harms customers in that there is the chance that customers will be put at risk. CUB asserts that the way to protect customers is to act expeditiously, force the company to correct the situation, and allow customers to make an informed choice.

**Nicor Initial Comments:** There is no need to implement an expedited hearing process for Section 19-120 complaints seeking a cease and desist order. There is nothing in the Public Utilities Act to prevent a complainant from seeking an expedited schedule either in the complaint or in a separate motion, leaving it to the discretion of the Administrative Law Judge ("ALJ") to determine whether an expedited process is warranted. A mandatory expedited process is neither desirable nor necessary.

**Peoples Energy Initial Comments:** Peoples Energy questions the need for special procedures to address the cease and desist provision in Section 19-120. Peoples Energy joins Nicor in noting that there is nothing to prevent an ALJ from setting an expedited schedule. There is no evidence that the lack of an expedited process resulted in the denial of the "cease and desist" relief sought by a complainant. Peoples Energy cites three docketed cases in which there was a request for a cease and desist order. In two of the cases, the ALJ set expedited schedules. In the third case, there is a question of Commission jurisdiction, and Peoples Energy points out that an expedited procedure would not be appropriate in such a case. Peoples Energy further claims that, in the only case litigated to a final order, the record included no evidence of customer harm. Finally, Peoples Energy points out that the Electric Service Customer Choice and Rate Relief Law of 1997 contains a similar "cease and desist" provision [220 ILCS 5/16-115B(b)(1)], and Peoples Energy is unaware of any complaint brought under that

provision. The Commission's existing procedural rules give the ALJs ample discretion to prevent undue delay.

**Nicor Reply Comments:** Nicor takes exception to CUB's claims regarding the cases brought under Article XIX. Generally, the ills noted by CUB do not stem from any action by respondents to the complaints.

**Retail Suppliers Reply Comments:** CUB does not address why the existing provisions of the Act and the Commission rules of practice do not provide an adequate means by which a complainant may receive an expedited proceeding.

**Question 1(b): Should an "expedited" cease and desist process include an opportunity for "emergency" relief such as that which is available under Sections 13-514 and 13-515 of the Public Utilities Act when a competitive telecommunications carrier alleges that the anticompetitive actions of an incumbent carrier will cause irreparable harm to the complainant?**

**CUB Initial Comments:** CUB believes that the Commission should look to Sections 13-514 and 13-515 of the Act for guidance in developing a process for handling Article 19 complaints. Quick action is equally as important for natural gas retail customers as it is for telecommunications wholesale customers.

**Nicor Initial Comments:** The complaints filed under Article XIII relate to intentional anti-competitive conduct that hinders the complaining carrier's ability to conduct business. Complaints filed under Section 19-120 generally are filed by customers against alternative suppliers and are economic in nature. These complaints do not rise to the level of "emergency" because the customer will continue to receive gas service during the pendency of the complaint process. Any relief/penalty awarded is

not something that needs to be decided on an emergency basis. The framework set up under Sections 13-514 and 13-515 indicates that the Commission cannot effectuate significant changes to the hearings process without statutory change. Section 19-120 specifically references Article X for requirements applicable to the complaint process. Without amendment to Section 19-120, the Commission cannot unilaterally implement an expedited hearing process.

**Peoples Energy Initial Comments:** There are critical distinctions between Article XIII and Article XIX of the Act, and the Commission should not draw on Article XIII in fashioning a process. The emergency relief provided for in Section 13-515(e) expressly provides for relief “without an evidentiary hearing.” By contrast, Section 19-120(c) of the Act expressly requires notice and hearing. Consequently, the Section 13-515 process cannot, through a rulemaking, be made applicable under Article XIX. Sections 13-514 and 13-515 relate to a telecommunications carrier impeding competition. Were there an analogous provision in Article XIX, it would apply to public utilities. Article XIX provides for the limited regulation of competitors, not entities that can block competitors. Finally, permitting emergency relief without a hearing would place the respondent at a competitive disadvantage based on allegations to which it had no or only limited opportunity to respond.

**CUB Reply Comments:** CUB disputes Nicor's comment on the lack of "emergency" status for Section 19-120 complaints. CUB maintains that the harm is not in losing gas service, but in being denied a valid choice. CUB also maintains that the fact that the legislature does not provide for the Commission's awarding damages indicates that the solution to misleading marketing is to deal with it up front, before

customers are harmed. Customers who chose a misleading offer are denied the opportunity to take advantage of offers that may no longer be available.

**Nicor Reply Comments:** Nicor responds to CUB on inquiries 1(b) through 1(e) in one reply. CUB erroneously equates the need for action in Article XIX cases with the need for expedited action in cases brought under Sections 13-514 and 13-515 of the Act in the telecommunications industry. Sections 13-514 and 13-515 contain legislative exceptions to the normal hearing process and cannot be relied upon for guidance in Article XIX cases as CUB suggests. CUB also ignores the fact that a party can seek to have a complaint expedited under the standard hearing process, given the authority and discretion of the ALJ

**Question 1(c): Would the availability of an expedited or emergency cease and desist process under Article 19 be intended to prevent harm to competition in a manner similar to that provided in Section 13-515 of the Public Utilities Act? If so, please explain how a complaint *against* a competitive gas supplier is comparable to a complaint that is filed *by* a competitive telecommunications carrier against a noncompetitive carrier.**

**CUB Initial Comments:** While gas utilities could act in ways that harm competitors, the main reason CUB believes the Commission should implement an expedited process is to protect consumers. The difficulties of making informed choices are much greater in the gas industry, and the harm to customers is potentially much greater. In the gas industry the choices customers make can change their gas bills by hundreds of dollars in a heating season. CUB notes that customer choice offers the promise of competitors offering customers lower prices, but it is CUB's opinion that

there is no evidence that this is the case. CUB claims to have seen providers, particularly utility affiliates, using questionable marketing tactics to attract customers to sign up for offers they do not understand. The only way to take the aggressive approach to protecting consumers is with an expedited process that penalizes suppliers that violate the rules. The Commission should also consider that when a seller uses misleading or deceptive marketing to induce customers to sign up for a plan, the competitive market is harmed. Competition can only work if rules are fairly and equitably enforced. Delays may lead to competitors prematurely exiting the market because they cannot compete with offers that do not actually provide lower priced gas, but deceive customers into purchasing a more expensive product.

**Nicor Initial Comments:** Section 19-120 complaints against competitive gas suppliers are not comparable to Section 13-514 complaints filed by a telecommunications carrier. The complaints deal with a carrier knowingly impeding competition. Complaints brought under Section 19-120 are between an AGS and customers and do not relate to the prevention of competitive harm. The adoption of a complaint process that restricts due process may have a chilling effect on competition by discouraging competitors from entering the Illinois market. Given a complainant's existing ability to seek an expedited hearing, there is no basis to impose such a process on all Section 19-120 complaints.

**Peoples Energy Initial Comments:** No. Article XIX governs competitors who have no market power to impede competition. By contrast, Article XIII is directed at entities who may be able to impede competition.

**CUB Reply Comments:** CUB disputes Nicor's contention that expedited proceedings could have a "chilling effect" on competition. CUB notes with approval the Retail Suppliers' comment that, given the nature of the competitive gas market, it is possible that the actions of other market participants will need to be addressed on an expedited basis.

**Retail Suppliers Reply Comments:** The Retail Suppliers take issue with CUB's contention that there is no evidence that customer choice in Illinois offers customers lower prices. CUB supplies no support for this, and this is not germane to the purpose of this NOI.

**Question 1(d): What other purposes would be served by an expedited or emergency cease and desist process? For what other types of inappropriate activities could emergency cease and desist relief be requested? Is fraudulent marketing one such activity? Are there others? Should simply including the words "cease and desist" in a complaint be sufficient to initiate the emergency relief process and any deadlines associated with it?**

**CUB Initial Comments:** CUB believes that the default process should be an expedited process with a shortened time frame, that an expedited process would serve to protect both consumers and competitors, and should be the norm rather than the exception. Current Commission procedures weigh heavily towards the rights of the providers. In Article 19 cases, justice delayed can certainly be justice denied. The Administrative Law Judges at the Commission have acted conservatively, unless specifically directed otherwise, depending on the rules for guidance, and generally relying on the outer limits of the time frames. The current Commission rules were designed for a different time when the Commission presided over long, arduous rate



cases with multiple witnesses and large quantities of testimony. The cases at issue are consumer fraud cases with far fewer data requests, fewer work papers, etc. The default time for discovery needs to be shortened accordingly. In setting the time frame for a case the Commission should create a list of factors to consider, including the amount of potential harm to consumers, possible inequity to competitors, the timing of the offer in relation to the heating season, and the complexity or difficulty of the case. With respect to the last inquiry, the complexity of the case, consideration should be given to the amount of discovery needed, the need for written testimony, the need for a hearing, and the need for briefs. CUB urges the Commission to develop flexible guidelines that move cases to completion within three to four months of filing, with abbreviated discovery, reduced testimony, and limited briefing. CUB states that, in some cases, it may not be necessary to hold a hearing, while in others, it may not be necessary to submit briefs. While certain complaints may need a lengthy discovery period, a supplier should not be allowed to “stonewall” in order to delay a proceeding.

**Peoples Energy Initial Comments:** An expedited or emergency process is not needed. However, were the Commission to adopt such a process, simply including the words “cease and desist” in the complaint should not be sufficient to trigger an expedited or emergency process. The complainant should be required to plead with specificity why a cease and desist order is appropriate. The respondent must have sufficient notice of the complainant’s specific allegations to respond effectively.

**Retail Suppliers Reply Comments:** CUB takes a critical first step in the development of standards by providing its list of factors. Developing a clear path of inquiry and evaluation for potentially expedited proceedings should assist in reducing

the uncertainty of an open-ended proceeding for all parties, while ensuring that the Commission retains some discretion in its case scheduling.

**Question 1(e): If an expedited or emergency process were implemented, what standards would be applicable for granting emergency relief? Would a showing of irreparable harm and likelihood of success on the merits be required? Should anyone other than the entity being harmed be permitted to seek emergency relief?**

**CUB Initial Comments:** CUB recognizes that emergency relief should only be granted when circumstances warrant such relief. Standards for emergency relief must be in place to ensure fairness to the parties and should include irreparable harm and likelihood of success on the merits. However, the Commission should not interpret “irreparable harm” so narrowly that it never applies.

**Peoples Energy Initial Comments:** The requested relief is comparable to a request for a temporary restraining order or preliminary injunction. Accordingly, the standard for granting such relief should be comparable. Under Illinois law, a complaint that requests injunctive relief must show the following four elements:

That the plaintiff possesses a certain and clearly ascertained “right” which needs protection;

That plaintiff will suffer “irreparable injury” without the protection of the injunction;

That there is no “adequate remedy at law”; and

That the plaintiff is likely to be successful on the merits of his action.

These standards would be appropriate for governing any emergency or expedited process. Also, consistent with these standards, the entity alleging harm should be the complainant with the burden of making these showings.

**Question 1(f): Does the Commission have the statutory authority to require the posting of a bond by the person requesting the emergency relief? If the Commission has the authority, what factors would the Commission consider in setting the amount of the bond?**

**CUB Initial Comments:** Section 13-515 appropriately addresses the issue of frivolous requests for emergency relief by competitors. Any consumer representatives bringing requests for emergency relief should not be subject to such penalties. There is no economic incentive for consumer representatives to bring a frivolous complaint, and there is no evidence that this has ever been or will be a problem. Consumer representatives practice before the Commission on a regular basis and understand the consequences of bringing a frivolous complaint.

**Peoples Energy Initial Comments:** Peoples Energy expresses no opinion on this issue.

**Nicor Reply Comments:** Nicor disagrees with CUB's position that frivolous complaints will not be filed. Nicor opines that the Commission routinely receives frivolous complaints, and that an across-the-board expedited process would unnecessarily tax the resources of the Commission and other parties to a proceeding. If there is no need for a penalty provision because, as CUB argues, "there is no evidence that this has ever been or will be a problem," then the same rationale would dictate that

an expedited process is similarly unwarranted because there is no evidence that a problem exists with the current hearing process.

**Question 2: In the absence of specific statutory authority mandating expedited proceedings, is there a statutory basis for expedited proceedings under Section 19-120 of the Public Utilities Act? Please provide specific citations to any relevant Sections of the Public Utilities Act and the Illinois Administrative Procedure Act.**

**CUB Initial Comments:** CUB initially notes that the Commission has broad statutory authority to carry out its responsibilities [220 ILCS 5/1-102]. The gas companies in Illinois chose to open their service territories through Commission-approved tariffs, rather than specific legislative authority corresponding to the Electric Service Customer Choice and Rate Relief Law of 1997. It would be inconsistent to now argue that the Commission has authority to grant the utilities' request to open up the market to competition, but lacks authority to police that market. CUB cites the statement by the court in *Abbott Laboratories v. Illinois Commerce Commission* that "the express grant of authority to an administrative agency also includes the authority to do what is reasonably necessary to accomplish the legislature's objective" (*Abbott Laboratories v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 712 (1st Dist. 1997)) as support for its proposition.

**Nicor Initial Comments:** There is no statutory authority for expedited Section 19-120 proceedings. The expedited proceedings for actions under Sections 13-514 and 13-515 are statutorily mandated. Section 19-120 specifically states that "The Commission shall have jurisdiction in accordance with the provisions of Article X of this Act to entertain and dispose of any complaint against an alternative gas supplier...."

Section 10-108 of the Act sets forth the specific requirements applicable to the complaint process. Any implementation of an expedited hearing process requires an amendment to Section 19-120.

**Peoples Energy Initial Comments:** Section 19-120 of the Act requires notice and a hearing before the Commission takes one of the actions authorized by Article XIX. However, the ALJs have considerable latitude in managing their dockets, including setting schedules. See, e.g., 83 Ill. Admin. Code Part 200, Subparts C and D. As a check on that discretion, a party disagreeing with an ALJ's decision can petition the Commission for interlocutory review. In fact, the ALJs have put expedited schedules in place for two of the complaints brought under Article XIX.

**CUB Reply Comments:** CUB reiterates its position that, while there may be a lack of specific statutory authority to expedite proceedings under Section 19-120, Section 10-101 of the Act authorizes the Commission "to hold investigations, inquiries, and hearings concerning any matters covered by the provisions of this Act, or by any other Acts relating to public utilities subject to such rules and regulations as the Commission may establish." CUB contends that this language gives the Commission the authority to adopt whatever procedures it deems appropriate to enforce Article XIX.

**Nicor Reply Comments:** Nicor disputes CUB's claim that there is inherent authority for the Commission to adopt an expedited process. Nicor again emphasizes that the expedited proceedings outlined in Sections 13-514 and 13-515 are statutorily mandated. No such legislative mandate exists with respect to Section 19-120.

**Retail Suppliers Reply Comments:** The Retail Suppliers agree with Nicor and Peoples Energy that the ALJ is not precluded from granting requests for expedited

schedules in proceedings. It appears that CUB's true concern is the adequacy of the standards under which an expedited schedule is evaluated and granted rather than the mere promulgation of rules providing for a speedy proceeding.

**Question 3(a): Will expedited proceedings afford all parties to a complaint proceeding sufficient due process?**

**CUB Initial Comments:** Due process rights apply equally to both plaintiffs and defendants. The circumstances of the case often dictate what is appropriate in terms of due process. The Commission should not ignore complainant's right to have its complaint addressed in a timely manner that affords real relief.

**Nicor Initial Comments:** The extremely short time frames similar to those set forth in Section 13-515 may not afford all parties to a complaint sufficient due process protections. It is difficult to establish an adequate record in 30 days between the filing of a complaint and the evidentiary hearing. An expedited process is not warranted in Section 19-120 cases, because they are generally economic in nature.

**Peoples Energy Initial Comments:** Without a specific proposal upon which to comment, Peoples Energy cannot conclude that an expedited proceeding would protect the parties' due process rights. The facts of a particular case may require discovery or raise additional issues that cannot be accommodated by an expedited schedule. The Commission's current procedural rules and processes are sufficient to strike an appropriate balance between expediting proceedings and protecting parties' due process rights.

**Nicor Reply Comments:** CUB acknowledges that "the circumstances of the case often dictate what is appropriate in terms of due process." This is why CUB's

universal approach would not work. A case-by-case approach makes more sense than a process that expedites every proceeding.

**Question 3(b): If an expedited or emergency process is implemented, what procedural steps would be appropriate to ensure that parties have a reasonable opportunity to participate and that an informed decision, based on evidence of record, can be reached? For example, should a reasonable opportunity for discovery be provided? Are some procedural steps required by statute or rule?**

**CUB Initial Comments:** There are many ways to ensure parties have a reasonable opportunity to participate in a hearing. CUB notes that any decision reached by the Commission must be based on the record, but that creating a record and basing a ruling on evidence does not necessarily require a lengthy process. The Commission must take into consideration many factors, including the harm to customers and competitors that may be inevitable as a result of a lengthy process.

**Peoples Energy Initial Comments:** Article XIX requires notice and a hearing before the Commission can impose any of the remedies provided in Section 19-120, including the issuance of a cease and desist order. The Commission's Rules of Practice are sufficient to cover the various types of hearings that may be appropriate. Whether discovery is necessary to protect due process rights likely depends on the facts of the case. The complexity and number of issues, as well as whether facts are in dispute, affect the type of hearing and the evidentiary record that must be developed.

**Question 3(c): Would the expedited or emergency cease and desist relief be granted in an interim order? If so, is there a statutory basis for doing so?**

**CUB Initial Comments:** While the Public Utilities Act does not give specific authority to grant interim orders, CUB submits that the Commission derives such authority from the general provisions of the Act.

**Peoples Energy Initial Comments:** Article XIX requires notice and a hearing before the Commission can impose any of the remedies provided in Section 19-120, including the issuance of a cease and desist order.

**Question 4: If an expedited proceeding is necessary, identify any current Commission rules that would need to be amended to provide for such a proceeding.**

**CUB Initial Comments:** CUB believes that the Commission can take steps to expedite a proceeding under the current rules. However, the current rules should be amended to clarify the Commission's expectations regarding how these cases should be handled.

**Nicor Initial Comments:** A universal expedited hearing process is not warranted. Section 19-120 requires that complaints be entertained and disposed of in accordance with Article X of the Act, so that an expedited hearing process cannot be implemented without the amendment of Section 19-120.

**Peoples Energy Initial Comments:** Commission rules do not need to be amended, as proceedings can be expedited as necessary under the existing rules.

#### **IV. General Comments**

In its initial comments, the **Retail Suppliers** did not provide specific answers to the individual questions and issues raised in the NOI initiating document. The Retail Suppliers outlined general guidelines encompassing similar procedural strictures to those in Article XIII of the Public Utilities Act and benefiting gas competition in Illinois.



The Retail Suppliers first suggest that the Commission convene a workshop so that industry participants could exchange ideas informally. Next, the Retail Suppliers request that the Commission review its rules to confirm that the obligations placed upon alternative suppliers are clear and unambiguous. Third, the Retail Suppliers suggest that the Commission's complaint process should strive for procedural clarity. Fourth, the Retail Suppliers contend that the Commission should adopt a complaint process that is capable of being expedited regardless of the type of relief sought by complainant. This would lead to greater consistency and efficiency for the Commission and all parties. Fifth, the Retail Suppliers maintain that Commission should adopt a complaint process that is capable of being expedited regardless of the identity of the respondent. As a last point, the Retail Suppliers recommend that the Commission establish mediation and arbitration procedures in which the parties to a complaint case could voluntarily participate.

## **V. Analysis and recommendation**

On the basis of the Comments and Reply Comments, it does not appear that there is an obvious need for the Commission to develop and adopt rules for an expedited process for complaint cases seeking cease and desist orders pursuant to Section 19-120 of the Act. While CUB alleges that such cases to date indicate the need for an expedited process, there has been no convincing argument presented that the ALJ assigned to a particular case is unable to exercise the discretion and authority to set an expedited schedule in a particular case when such action is appropriate. The number of cases to date does not indicate that the Commission should expect an inundation of these complaints.

An analysis of statutory authority also argues against the adoption of an expedited process for cases filed pursuant to Section 19-120 of the Act. CUB asserts that the Commission has general authority to adopt rules of practice as it sees fit to process complaints under Section 19-120. However, the only instances in which the Commission has instituted an expedited process for complaint cases are those subject to Sections 13-514 and 13-515 of the Public Utilities Act and implemented by 83 Ill. Adm. Code 766, "Telecommunications Enforcement". As pointed out by Nicor and Peoples Energy, the mandate for the expedited process has a specific statutory basis. There is no such corresponding statutory mandate for expedited proceedings in Article XIX. CUB's assertion of general statutory authority is not supported by the review of authority in the Public Utilities Act. In addition, while not cited by any comments, the Illinois Administrative Procedure Act requires that, in any contested case, "all parties shall be afforded an opportunity for a hearing after reasonable notice." [5 ILCS 100/10-25(a)]. Without specific statutory authority to authorize proceedings that may not provide an opportunity for a hearing, the Commission should be cautious in proposing any process that will affect a party's rights under either the Public Utilities Act or the Illinois Administrative Procedure Act.